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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

1941 TERM

No. [redacted] 1275

ENTERPRISE BOX COMPANY,

PETITIONER, APPELLANT BELOW,

vs.

THOMAS W. HOLLAND,
As Successor of PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,

RESPONDENT, APPELLEE BELOW,

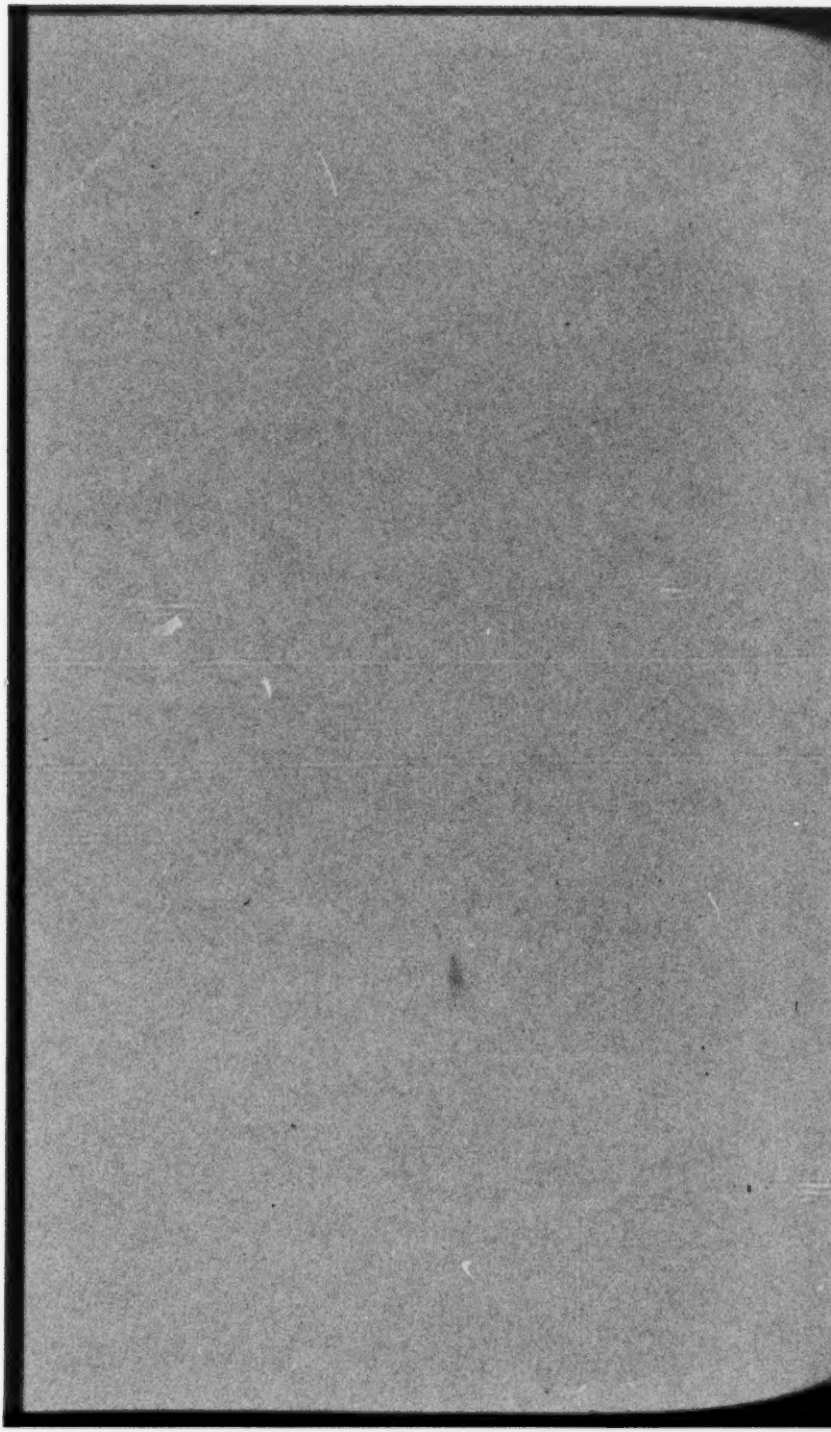
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

MARTIN CARABALLO, Tampa, Florida,
Attorney for Petitioner

JOHN G. GRAHAM, Tampa, Florida,
Of Counsel



In the Supreme Court of the United States

No. 9909

ENTERPRISE BOX COMPANY,
PETITIONER, APPELLANT BELOW,

vs.

THOMAS W. HOLLAND,
As Successor of PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,
RESPONDENT, APPELLEE BELOW,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT
and
BRIEF IN SUPPORT THEREOF.

To the Honorable Owen J. Roberts, Chief Justice of the Supreme Court of the United States, and to the Associate Justices Thereof:

Your petitioner respectfully shows:—

I

SUMMARY STATEMENT OF MATTER INVOLVED

This case involves the construction of certain provisions of the Fair Labor Standards Act and their ap-

plicability to the activities and business of the petitioner. The facts in the case are undisputed and are in effect as follows:

The petitioner is a Florida corporation engaged in the manufacture of cigar boxes for use as containers for cigars produced by cigar factories. Its entire output is sold intrastate to local cigar factories.

The cigar factories to whom petitioner's boxes were sold, sell a large proportion of their cigars in interstate commerce, no charge being made the purchaser of the cigars for the containers in which they are enclosed. By law, these containers, when once filled with cigars, can not be refilled, reused nor trafficked in, and are subject to destruction by Revenue Agents when emptied.

The petitioner at the time of sale had knowledge of such intended use of its product by the cigar factories.

In the operation of its business the petitioner did not comply with Sections 6, 7 and 11 of the Act. See Record Pages 10 to 13 inclusive.

II

JURISDICTION

On the 20th day of May, 1940, the respondent, contending that the petitioner under the facts stated above was engaged in the production of goods for commerce and had violated Section 15 (a) (1) of the Act in selling its goods with knowledge that shipment,

delivery and sale in commerce was intended, instituted this suit in the United States District Court for the Southern District of Florida, praying that petitioner be enjoined from further violations of the provisions of the Act. Record pages 1 to 6 inclusive.

The Petitioner, contending that the Act had no application to its activities, by its answer denied that it was engaged in the production of goods for commerce or that it had sold the same with knowledge that shipment, delivery or sale in commerce was intended, and alleged that all of its manufactured products were sold intrastate, and that the Fair Labor Standards Act had no application to its business. Record pages 6 to 9 inclusive.

On the trial of the case the facts above stated being presented to the District Court, the judge thereof filed his Findings of Fact and Conclusions of Law in which he held that Congress could regulate purely local transactions that *affected* interstate commerce or the flow of goods in commerce, and that Congress intended by the use of the words "sell with knowledge of intent" in Section 15 (a) (1) to prohibit the sale of goods intrastate if interstate commerce was *affected,* and issued its injunction prohibiting the petitioner from further violating the several provisions of the Act. Record pages 13 to 26 inclusive.

An appeal was taken by the petitioner from the decree so entered to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, which Court on February 26, 1942, sustained the decision of the Lower Court. Record, pages 35 to 40 inclusive.

That on the 16th day of March, 1942, the petitioner filed its motion for a rehearing. Record, page 41.

That said motion for a rehearing was, on the 24th day of March, 1942, denied by the said Court. Record, page 44.

This petition for a writ of certiorari is being mailed in time to be filed before June 22nd, 1942.

The petitioner files this petition for a writ of certiorari with the United States Supreme Court to review the decision of the Circuit Court of Appeals, under the provisions of Title 28, U.S.C.A., Section 347. Judicial Code, Section 240 as amended.

III

QUESTIONS PRESENTED

Question One.

Did Congress, in enacting the Fair Labor Standards Act, intend to include within its provisions industries producing and selling their products intrastate when such sales were made in good faith and without intent to evade the provisions thereof. In other words, did Congress intend that the Fair Labor Standards Act apply to any and all industries whose activities *affect* interstate commerce, or are the provisions of said Act limited in their application to industries which are *themselves* engaged in commerce or in the production of goods for commerce.

Question Two

Where by law cigar box containers can not be re-used, refilled nor trafficked in, and are subject to destruction by Revenue Agents when emptied, will a shipment of cigars interstate by cigar factories, packed in such containers, be deemed to be a shipment in commerce of the *containers* within the meaning and intent of the Fair Labor Standards Act.

IV

REASONS FOR ALLOWANCE OF WRIT

1. The decision of the Circuit Court of Appeals to the effect that Congress intended the provisions of the Act to include activities and sales *affecting* interstate commerce is in conflict with the decision of the United States Circuit Court of Appeals for the Tenth Judicial Circuit on the same matter in the case of *Jewell Tea Company vs. Williams,* 118 Fed. 2nd, page 202.

2. The decision of the Circuit Court of Appeals is an erroneous decision of an important question of general law.

3. The decision of the Circuit Court of Appeals involves an important question of Federal law which has not been, but should be, settled by this Court.

4. The decision of the Circuit Court of Appeals is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

5. The great importance to the business world and the legal profession of the Statute involved calls for an authoritative and elucidating decision as to the penal provisions of the Act.

Wherefore petitioner prays that a Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and formerly entitled on its docket, "Number 9909, Enterprise Box Company, Appellant, vs. Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee," and now proceeding, by substitution, against Thomas W. Holland, successor administrator, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment of said Circuit Court be reversed by this Court, and for such other relief as to the Court may seem proper.

Dated at Tampa, Florida, on this the 26th day of May, 1942.

ENTERPRISE BOX COMPANY,

By MARTIN CARABALLO,
Counsel for Petitioner.

JOHN G. GRAHAM,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

I

The opinion of the District Court for the Southern District of Florida, record, page 16, is reported in 37 Fed. Supp., page 331.

The opinion of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, record, page 35, is reported in 125 Fed. 2nd, Page 897. (Adv. sheets.)

The petitioner's motion for rehearing is shown on record page 41.

The denial of such motion is shown on record page 44.

II

JURISDICTION

1. The date of the judgment to be reviewed is February 26, 1942.

2. This motion for rehearing was filed in the Circuit Court of Appeals on March 16, 1942.

3. The motion for rehearing was denied on the 24th day of March, 1942.

4. The Statutory provisions which it is believed sustains the jurisdiction of this Court appear in Vol. 28 U.S.C.A., Section 347.

5. This case involves the construction and application of the provisions of the Fair Labor Standards Act, 28 U.S.C.A., Section 201-219.

6. The cases believed to sustain said jurisdiction are:

Fed. Trade Commission vs. Bunte Bros., Inc., 312 U.S. 349, 85 Law Ed. 881.

Arsenal Bldg. Corp. vs. Fleming, 86 Law Ed. 729, Adv. sheets.

Fleming vs. Belo Corp., 86 Law Ed. 92, Adv. sheets.

III

STATEMENT OF CASE

This has already been stated in the record on appeal, paragraphs 4 to 15 inclusive, on pages 9-14, which is adopted and made a part of this brief.

IV

SPECIFICATIONS OF ERRORS

1. The Lower Court erred in holding that under the facts of this case the petitioner here engaged in interstate commerce, or in the production of goods for commerce, within the meaning and intent of the Fair Labor Standards Act.

2. The Lower Court erred in holding that Congress intended that the Fair Labor Standards Act

should apply to the business conducted by the petitioner.

3. The Lower Court erred in holding that Congress had the power to make said act applicable to the business of petitioner.

4. The Lower Court erred in refusing to hold that the purchasers of the product manufactured and sold by petitioner were the ultimate consumers within the meaning and intent of said act of Congress.

5. The Lower Court erred in holding that petitioner's boxes were shipped in commerce within the meaning and intent of the Fair Labor Standards Act.

V

QUESTIONS PRESENTED

Question One.

Did Congress in enacting the Fair Labor Standards Act intend to include within its provisions industries producing and selling their products intrastate when such sales were made in good faith and without intent to evade the provisions thereof. In other words, did Congress intend that the Fair Labor Standards Act apply to any and all industries whose activities *affect* interstate commerce, or are the provisions of said Act limited in their application to industries which are *themselves* engaged in commerce or in the production of goods for commerce.

FACTS

As shown by the statement of facts, the petitioner did not ship, deliver or sell any of its products in interstate commerce, but manufactured its boxes for, and sold them to local cigar factories, in good faith, in intrastate commerce. While under the decisions of this Court this fact alone would not exempt petitioner's activities from Federal regulation, if they had a substantial effect on commerce, it does raise the question of whether Congress in enacting the Fair Labor Standards Act intended to regulate such intrastate activities.

So far as known to counsel for petitioner this question has not been presented to this Court for determination, and there appears to be a conflict in the decisions of the different Circuit Courts of Appeals regarding same. The Circuit Court of Appeals for the Tenth Judicial Circuit in the case of *Jewell Tea Company vs. Williams,* 118 Fed. 2nd, 202-206, has held,

> "The act by its terms is limited to employees engaged in interstate commerce or the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be any doubt as to the correctness of the interpretation, it is set at rest by the legislative history of the Act."

While in the case at bar, the United States Circuit Court of Appeals for the Fifth Judicial Circuit, 125 Fed. 2nd, 897-899, states in its opinion,

> "It is sufficient to say that the validity of the exercise of the commerce power is to be determined by what is regulated, not by what the regulation affects, and Congress may, by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce. By the express language employed in this section (15) (a)(1) Congress has made manifest its judgment that the regulation of such intrastate commerce is necessary to the effective regulation of interstate commerce. It would be practically impossible to regulate the interstate shipment without exercising control over the initial steps towards such transportation."

The Fair Labor Standards Act is national in scope and a final decision of this Court adjudicating the intention of Congress in enacting the Statute is necessary.

DISCUSSION

In determining the extent and application of Congressional enactments Courts are confined to the language of the Statute and the implications arising therefrom, but, as pointed out by this honorable court in the case of *Federal Trade Commission vs. Bunte Bros.*, 312 U.S. 349, 85 Law Ed. 881-883, where a similar question was presented:

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed the purpose explicitly. * * * * To be sure the construction of every such Statute brings a unique problem in which words derive vitality

> from the aim and nature of the specific legislation. But, bearing in mind that in ascertaining the scope of Congressional legislation a due regard for a proper adjustment of the local and national interest in our federal scheme must always be in the background, we ought not to find * * * * radiations beyond the obvious meaning of the language unless otherwise the purpose of the Act would be defeated."

Examining the several sections of the Fair Labor Standards Act in the light of the above decision, it will be observed that there are no words clearly indicating an intention to bring within its provisions activities *affecting* commerce, for as shown by Section 2, Congress only finds the existence of substandard labor conditions in industries *engaged in commerce* or in the *production of goods for commerce,* and again by Section 8 Congress declared the purpose of the Act was to reach the objective of 40c an hour in each industry *engaged in commerce* or in the *production of goods for commerce.*

It was because of this failure on the part of Congress to indicate that the Act was intended to cover industries engaged in producing goods *affecting* commerce, as well as the legislative history, and the decision of this Court in the *Bunte* case, supra, that led the Circuit Court of Appeals for the Tenth Circuit to hold that Congress did not intend that the terms of the Act should extend to intrastate activities.

In the case at bar, the Lower Court reached its conclusion that Congress intended to include in the coverage of the Act industries producing goods

affecting commerce because of the use of the words "sell with knowledge of intent" which appear in Section 15 (a) (1) of the Statute.

Counsel for petitioner believe that the Lower Court erred in so interpreting the phrase for the following reasons:

This court having held that Congress had the power under the commerce clause to regulate wages in industries engaged in commerce or in the production of goods for commerce, it necessarily follows that Congress had the further power of punishing criminally any such industry that violated the terms of the Act or attempted to evade the provisions thereof.

> *United States vs. Lewis Fox,* 95 U.S. 670, 24 Law Ed. 538.
>
> *United States vs. Hall,* 98 U.S. 343, 25 Law Ed. 180-185.

However, Section 15 (a) (1) is a criminal statute, designed by Congress to prevent industries engaged in commerce, or in the production of goods for commerce, from using interstate commerce as a means of marketing the goods owned or produced by them unless they had paid the wage required by Sections 6 and 7. Being a criminal section the language used therein can not alter or enlarge the definition or description of the industries Congress intended to cover by the language used in the body of the Act.

An examination of Section 15 (a) (1) reveals that its sanctions are clearly divisible into two separate and distinct offenses, to-wit:

> (a) "to transport, offer for transportation, ship, deliver or sell in commerce," or
>
> (b) "ship, deliver or sell with knowledge that shipment, delivery or sale thereof in commerce is intended,"

any goods in the production of which any employee is employed in violation of Sections 6 and 7.

Bearing in mind that the word "person" as used in this section connotes "industries engaged in commerce" or in "the production of goods for commerce," and further examining (a) and (b) above in the light of the purposes for which Congress may impose sanctions, or penalties, we find that clause (a) is sufficiently clear, definite and certain to warn any industry engaged in commerce, or in the production of goods for commerce, that it would be liable to the criminal penalties of the Act if it ships any of the goods, owned or produced by it, in commerce when it has not paid the wage scale required by Sections 6 and 7. The alternative, or (b) clause, "to ship, deliver or sell with knowledge that shipment, or delivery or sale thereof in commerce is intended" as used in the Section is also sufficiently definite to warn *such* industries that they will be liable to the criminal penalties of the Act if they try to evade its provisions by conspiracy or subterfuge, such as selling goods intrastate with knowledge that shipment thereof in commerce is intended, for the crime would be the fradulent intent to evade the act and not the sale of its products intrastate.

On the other hand, to interpret the alternative provision in the section as making criminal the local sale in good faith of goods simply because the seller has knowledge of an intent on the part of the purchaser to ship the same in commerce, would make "knowledge of an intent" a crime regardless of whether the "intention" was ever carried out.

If we assume, as it undoubtedly frequently happens, that the purchaser abandons his intention to ship in commerce and sells locally or disposes of such merchandise by means other than interstate commerce, we would have the anomalous situation where no shipment in commerce was ever made, and yet, because the purchaser had that *intention* when he bought the merchandise, the manufacturer has become guilty of a crime. We can not believe that Congress intended the words to be so construed or, if so, that it had the power to make criminal an innocent act.

Let us carry this matter to another logical conclusion. We shall first read into Section 215 the words called for by the body of the Act, which we will insert in parenthesis, and we find the section reading as follows:

> "* * * * * it shall be unlawful for any person (engaged in commerce or in the production of goods for commerce) to transport, offer for transportation, ship, deliver, or sell in commerce * * * * any goods in the production of which any (of his) employee (s) was employed in violation of, etc."

If that be the proper construction of this section, and we believe that it is, then in a case like the instant one where goods are manufactured locally for local sales only, without proof or implication that the method used was a subterfuge to evade the Act, as the District Court found, and even though such manufacturer had knowledge that its customers intended to ship its product in commerce, it is clear that such customer, itself engaged in commerce, could safely transport such merchandise through the arteries of commerce just so long as the customers *own* employees were paid the wages, and observed the hours, provide by this Act. Can it then be said that the manufacturer is subject to punishment when the customer who actually placed such merchandise in commerce is guiltless of any crime? We believe not, and yet that is the effect of the ruling below.

Counsel for petitioner respectfully submit that the Lower Court erred in holding that Congress intended the provisions of the Fair Labor Standards Act to apply to the activities of the petitioner, and that petitioner violated the provisions of Section 15 (a) (1) in its local sales.

Question Two

Where by law cigar box containers can not be reused, refilled nor trafficked in, and are subject to destruction by Revenue Agents when emptied, will a shipment of cigars interstate by cigar factories, packed in such containers, be deemed to be a shipment in commerce of the *containers* within the meaning and intent of the Fair Labor Standards Act.

DECISION OF COURT

The Lower Court has held that the petitioner's knowledge that the boxes would be used to contain cigars shipped in commerce by its customers constituted "knowledge of intent to ship in commerce" within the meaning of Section 15 (a) (1), and, the petitioner not having complied with Sections 6 and 7 of the Act, it violated Section 15 (a) (1) and issued its injunction restraining all further violations.

Counsel for petitioner believe such holding to be error.

DISCUSSION

Under the above statement it is clearly apparent that the cigar boxes produced by petitioner never came into competition with similar boxes in the State of destination of the cigars, for their economic value as articles of commerce were destroyed at the local factories.

By Section 3 (i) of the Act the word "goods" as used in Section 15 (a) (1) and elsewhere in the act is defined as,

> "Goods" means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

It is petitioner's contention that the cigar boxes not being a part or ingredient of the cigars, lost their identity as articles or subjects of commerce when filled by the local factories and were no longer "goods" within the meaning and intent of the Fair Labor Standards Act, for the cigar factories were the ultimate consumers.

Durr Drug Co. v. Long, 188 So. 873, 874.

McCarroll v. Scott Paper Co., 115 S.W. 2nd 839.

Wiseman v. Arkansas Wholesale Gro. Co., 90 S.W. 2nd 987.

Maller Co. Inc. v. Department of Finance, 25 N.W. 2nd 987.

Birmingham Paper Co. v. Curry, 190 So. 86.

J. R. Raible Co. v. State Tax Commission, 194 So. 560.

Counsel for petitioner respectfully submit that the Circuit Court of Appeals erred in holding that petitioner was subect to the terms of the Fair Labor Standards Act and had violated Section 15 (a) (1) thereof.

Respectfully submitted,

MARTIN CARABALLO,
Attorney for Petitioner.

JOHN G. GRAHAM,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. ——

ENTERPRISE BOX COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 16) is reported in 37 F. Supp. 331. The opinion of the Circuit Court of Appeals (R. 33) is reported in 125 F. (2d) 897.

JURISDICTION

The decree of the court below (R. 37) was entered on February 26, 1942. Petitioner's motion for rehearing (R. 41) was denied on March 24, 1942

(R. 44). The petition for a writ of certiorari was filed on June 1, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether petitioner's employees, engaged in the production of cigar boxes which are sold within the State to cigar manufacturers for filling within the State and distribution outside it are engaged in "production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

2. Whether the cigar boxes delivered within the State to cigar manufacturers for use as containers, constitute "goods" within the meaning of Section 3 (i) of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set out in the Appendix.

STATEMENT

On May 27, 1940, the Administrator filed in the District Court a complaint against petitioner alleging that petitioner was violating Sections 15 (a) (1), (2), and (5) of the Fair Labor Standards Act and requested an injunction against continuance of such violations. The complaint alleged that petitioner's employees were engaged in "the production of goods for commerce" within the

meaning of Sections 6 and 7 of that Act but that petitioner had not complied with those Sections (R. 2–6). In its answer, petitioner conceded that it had not complied with the requirements of Sections 6 and 7 but asserted that its employees were not engaged in "the production of goods for commerce" and that the Act was not applicable to it (R. 6–9). The District Court found that petitioner was subject to the Act and issued the injunction prayed for (R. 9–26). The Circuit Court of Appeals affirmed (R. 33). The findings of the District Court, which are supported by the evidence and are not challenged by petitioner, may be briefly summarized as follows:

Petitioner's employees are engaged within the State of Florida in the manufacture of cigar boxes which petitioner thereafter sells and delivers to cigar manufacturers situated within the same State (R. 17). The purchasers of the boxes pack their cigars therein and sell and ship a substantial portion of their products thus packed in interstate commerce (R. 18). At the time the boxes are manufactured, petitioner knows and intends that the boxes will be shipped out of the State (R. 20–21).

ARGUMENT

1. While petitioner's contentions are by no means clear, it appears to assert (Pet. 8–9), as it did below, that the production in which its employees are engaged is not "production for commerce" because

the boxes produced are shipped out of Florida by someone other than petitioner. But

> * * * the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce * * *

United States v. *Darby,* 312 U. S. 100, 118. The language of the Act evinces no legislative intention to exempt the production of goods which are sold locally with the expectation or understanding that the purchasers will transport them in interstate commerce. Indeed, the definition of "goods" in Section 3 (i) to include "any part or ingredient thereof" plainly includes materials produced locally and locally incorporated by another manufacturer or processor into a product thereafter shipped in commerce. And Section 15 (a) (1), which makes it unlawful to ship, deliver, or sell "hot" goods "with knowledge that shipment or delivery or sale thereof in commerce is intended" becomes meaningless unless it has application to manufacturers in the category of petitioner.

The Circuit Court of Appeals for the Fourth Circuit, the only other Circuit Court to pass upon this question, has held that employees of an ice manufacturer who sells the ice within the state to railroad carriers for subsequent shipment to extra-state destinations, are engaged in "production for

commerce." *Hamlet Ice Co.* v. *Fleming,* 5 Wage Hour Rept. 295. And with one exception, all federal district court decisions are in accord with the decision of the court below.[1]

2. Petitioner contends (Pet. 3, 5–7) that the Act does not expressly apply to activities "affecting commerce." But insofar as the employees are engaged in "production of goods for interstate commerce" within the meaning of Sections 6 and 7 of the Act, the fact that the statute does not cover, in addition, activities "affecting commerce" is immaterial. *A. B. Kirschbaum* v. *Walling,* Nos. 910, 924, this Term, decided June 1, 1942. For this reason, *Federal Trade Commission* v. *Bunte Bros.,*

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[1] *Accord: Sunshine Mining Co.* v. *Carver,* 34 F. Supp. 274 (Idaho) and 41 F. Supp. 60 (Idaho) (ore sold to and refined by a local smelter into metals); *Fleming* v. *Valdivieso,* 5 Wage Hour Rept. 132 (D. P. R.) (raw sugar sold to and refined by a local refinery into edible sugar); *Allen* v. *Moe,* 39 F. Supp. 5 (Idaho) (lumber sold to a local manufacturer and transformed into matches); *Divine* v. *Levy,* 39 F. Supp. 44 (W. D. La.); *St. John* v. *Brown,* 38 F. Supp. 385 (N. D. Tex.); *Fleming* v. *Rex Oil & Gas Co.,* 43 F. Supp. 950 (W. D. Mich.); *Whigham* v. *Tucker Oil Co.,* 4 Wage Hour Rept. 274 (N. D. Tex.); *Collins* v. *Hancock,* 4 Wage Hour Rept. 522 (D. La., Caddo Parish); *Fleming* v. *Schiff,* 5 Wage Hour Rept. 43 (D. Colo.) (wrapping paper and other paper products sold to local florists); *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654 (N. D. Ga.); *Gordon* v. *Paducah Ice Mfg. Co.,* 41 F. Supp. 980 (W. D. Ky.); *Nelson* v. *Southern Ice Co.,* 4 Wage Hour Rept. 562 (N. D. Tex.) (all three cases concern ice sold locally to interstate rail carriers for use as refrigerant of foods and beverages). *Contra: Chapman* v. *Home Ice Co.,* 43 F. Supp. 424 (W. D. Tenn.), pending an appeal to the Sixth Circuit (same).

312 U. S. 349, upon which petitioner relies (Pet. 5), is not pertinent to the question presented.[2]

3. Petitioner's contention (Pet. 11–12) that the cigar boxes are not "goods" within the meaning of Section 3 (i) because the cigar manufacturers are "the ultimate consumers" of the boxes, ignores the specific requirement of Section 3 (i) that the products be already delivered to the ultimate consumer before they lose their character as "goods." Manifestly, even if the cigar manufacturers are ultimate consumers of the boxes, which is open to serious doubt, the fact that the boxes are not "goods" while in the possession of such manufacturers, does not relate back to destroy their character as "goods" at the time of their production. *Hamlet Ice Co.* v. *Fleming,* 5 Wage Hour Rept. 295 (C. C. A. 4); *Gordon* v. *Paducah Ice Mfg. Co.,* 41 F. Supp. 980 (W. D. Ky.); *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654 (N. D. Ga), pending on appeal to the Fifth Circuit.

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[2] *Jewell Tea Company* v. *Williams*, 118 F. (2d) 202 (C. C. A. 10), upon which petitioner relies (Pet. 4), does not concern the question whether petitioner's employees are engaged in "production of goods for commerce." The *Jewell Tea* case held that employees engaged in distribution within a State of goods brought into the State by their employer are not "in commerce" within the meaning of the Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States
Department of Labor.

JUNE 1942.

APPENDIX

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner

working on such goods, or in any process or occupation necessary to the production thereof, in any State.

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SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

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